



OFFICE of *the* ATTORNEY GENERAL
GREG ABBOTT

January 22, 2003

Ms. Gail Kikawa McConnell
Ms. Cara C. Wood
Assistant District Attorney
9th Judicial District
301 North Thompson, Suite 106
Conroe, Texas 77301-2824

OR2003-0432

Dear Ms. McConnell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176143.

The District Attorney for the 9th Judicial District (the "district attorney") received a request for the "complete personnel file" for a named employee of the Montgomery County Sheriff's Department (the "sheriff"), "an accounting of all of [the employee]'s assignments and the time span that he held each position," and all information regarding the sheriff's employee and a second named individual in relation to a specified internal investigation. The district attorney received a second request for videotaped, tape recorded or written statements made by or related to the same two individuals mentioned in the first request, for all information related to the specified internal investigation, and for the investigative report by the Constable for Precinct Four (the "constable") together with related witness statements.¹ You state that the district attorney does not possess the employee's personnel file or the record of his assignments, and that the constable has not provided any investigative report or

¹The second request was clarified by the requestor on November 7, 2002, and further clarified on November 14, 2002.

witness statements to the district attorney.² You state that some information responsive to the second request has been released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

We first address your representation that some of the submitted records are held by the district attorney on behalf of a grand jury and are, therefore, not subject to the Act. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the submitted information was obtained by the district attorney pursuant to a grand jury subpoena or at the direction of the grand jury, the information is in the custody of the district attorney as agent of the grand jury and is not subject to disclosure under chapter 552. *Id.* at 4. To the extent, however, that the submitted information was not obtained by the district attorney pursuant to a grand jury subpoena or at the direction of the grand jury, the information is subject to disclosure under chapter 552 and must be released unless an exception to disclosure is demonstrated to be applicable. As we are unable to determine the

²The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

extent to which the submitted information is subject to chapter 552, we will address your exceptions to disclosure.

We note that the submitted records include information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. A portion of the information that you submitted to us for review is a completed report or investigation, which falls into one of the categories of information made expressly public by section 552.022. *See* Gov't Code section 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. We will consider your argument under section 552.108 with respect to all of the submitted information.

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the Internal Affairs (IAF) file of the sheriff has been forwarded to the Federal Bureau of Investigation (the "FBI") and relates to a pending criminal investigation being conducted by the FBI. Based upon your representation, we conclude that the release of the IAF file would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 372 at 4 (1983) (law enforcement exception may be invoked by any proper custodian of information relating to an incident allegedly involving criminal conduct that remains under active investigation or prosecution). Thus, the district attorney may withhold the IAF file from public disclosure under section 552.108(a)(1).

With regard to the remaining information, although you indicate that this information relates to the FBI investigation as well as to an investigation being conducted by the Texas Rangers,

you do not indicate that the remaining submitted information has been forwarded to the FBI or to the Texas Rangers, nor have you provided any indication that the FBI or the Texas Rangers want to withhold the information. Additionally, you have not established that the information at issue pertains to an otherwise ongoing criminal investigation or prosecution in your office, nor have you explained how its release would interfere with the detection, investigation, or prosecution of crime. *See Gov't Code § 552.108(a)(1)*. Thus, you have not met your burden and the remaining information may not be withheld under section 552.108(a)(1).

We will next address your arguments under section 552.108(a)(2) and (a)(4). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. It is not clear to this office, nor have you explained, how or if the information here at issue relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code § 552.108(a)(2)*. Section 552.108(a)(4) protects information prepared by a prosecutor in anticipation of or in the course of preparing for criminal litigation or information that reflects the prosecutor's mental impressions or legal reasoning. *See Gov't Code § 552.108(a)(4)*. You do not assert that the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See Gov't Code § 552.108(a)(4)*.⁴ Thus, you may not withhold the remaining submitted information from disclosure under section 552.108.

You also claim that the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

⁴We note that you also raise the attorney work product exception under section 552.107 of the Government Code. However, section 552.107 excepts information coming within the attorney-client privilege. *See Gov't Code 552.107*. Thus, we do not address your work product argument under section 552.107.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request is received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). While you state that "[t]here is currently an ongoing investigation for possible litigation of a criminal nature," you do not provide concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.

Furthermore, while you inform us that litigation is pending in a "whistleblower" suit, you also state that the district attorney is not a party to this case. Section 552.103 applies only where the litigation involves or is expected to involve the governmental body that is claiming

the exception. Open Records Decision No. 392 (1983). Thus, none of the remaining submitted information may be withheld from disclosure under section 552.103.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. However, we find that none of the information at issue is CHRI. Therefore, we conclude that no portion of the remaining submitted information may be withheld under section 411.083 in conjunction with section 552.101.

You next assert that Texas law prohibits the public disclosure of the results of polygraph examinations. Occ. Code § 1703.306. The remaining submitted information, however, contains no such results. Thus, section 1703.306 is inapplicable to this information.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act.⁵ *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

⁵Section 552.101 also encompasses the doctrines of common-law and constitutional privacy.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We note that because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.-Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting

Restatement of Torts 2d); *See* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”).

Based upon our review of your arguments and the remaining submitted information, we find that no portion of the information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law or constitutional right to privacy.

Finally, we note that the remaining submitted information contains a driver’s license number. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

To the extent that the driver’s license number was issued by an agency of this state, the district attorney must withhold it under section 552.130.

In summary, to the extent that the submitted information was obtained by the district attorney pursuant to a grand jury subpoena or at the direction of the grand jury, the information is in the custody of the district attorney as agent of the grand jury and is not subject to disclosure under chapter 552. To the extent the submitted information was not so obtained, the district attorney may withhold the IAF file from public disclosure under section 552.108(a)(1). To the extent that the driver’s license number was issued by an agency of this state, it must be withheld under section 552.130. The remaining submitted information must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 176143

Enc. Submitted documents

c: Ms. Ginger Jenkins
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